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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANDREW HALPERIN, Defendant and Appellant.	B209310 (Los Angeles County Super. Ct. No. MA038610)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol Koppel, Judge. (Retired Judge of the Mun. Ct. for the San Bernardino Jud. Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Kathleen M. Redmond, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Andrew Halperin of assault by means of force likely to produce great bodily injury upon Donna Hein in violation of Penal Code section 245, subdivision (a)(1).[1] The two other counts alleged against defendant—residential robbery (§ 211) and dissuading a witness from reporting a crime (§ 136.1)—which arose out of the same May 16, 2007 incident, were dismissed after the jury was unable to reach verdicts. In a separate proceeding, the jury found the recidivist allegations true—that defendant suffered four serious or violent felony convictions (§ 667, subd. (a)) which qualified as strikes for purposes of the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and that defendant served four prior prison terms (§ 667.5, subd. (b)). The trial court imposed a three strikes law sentence of 25 years to life, plus 4 years for the prior prison term findings.

In his timely appeal, defendant contends the lower court prevented him from adequately preparing for his preliminary hearing by failing to enforce his rights to discovery and by denying his request for a continuance and, in so doing, violated his state and federal constitutional rights to due process and a fair trial. Defendant argues the same or similar discovery violations continued up to the time of trial, necessitating the grant of a pretrial continuance. Additionally, defendant contends the trial court erred by (1) refusing to delay the trial to give defendant more time to prepare to testify on his own behalf; (2) denying his request for a continuance of the sentencing hearing; (3) failing to appoint advisory counsel; (4) failing to instruct the jury on the lesser included offense of simple assault; (5) limiting the length of defendant's closing argument; (6) denying defendant's request to reopen the defense case; (7) improperly requiring defendant to wear restraints during trial; and (8) failing to specially instruct the jury to disregard defendant's outbursts during trial. Defendant also contends those alleged errors were prejudicial when considered together, if not singly. We disagree and affirm.

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[1] All further statutory references are to the Penal Code.

STATEMENT OF FACTS

On May 16, 2007, Donna Hein resided in room 10 of the Bon Aire Motel in Lancaster. She was a drug addict who worked as a prostitute there, having recently been released from jail on her latest prostitution conviction. She was also on parole for commercial burglary. Hein used heroin that morning to prevent withdrawal symptoms. At 9:00 p.m., she was not intoxicated, but feeling ill from lack of the narcotic. The door to her room was partially open. Defendant knocked. Hein had met him a few years before when he paid for her services as a prostitute; he was staying in room 6 of the motel. Defendant asked her to help him get drugs. She knew that Jane Hector, another woman who worked as a prostitute in the motel, had access to drugs. Hein told defendant that she heard defendant had robbed and choked Hector after an act of prostitution, and Hein would not help him until he resolved the matter with Hector. When defendant asserted he had "made it right" with her, Hein told him she would telephone Hector and find out whether that was the case.

As Hein went to her nightstand to pick up the telephone, she turned to find that defendant had entered her room and was standing behind her. She had intended to call the police because she was afraid of defendant—after the prostitution incident two years before, defendant "pulled a knife" on the hotel manager and "had to be escorted out of there by five other guys." Before she could do so, defendant punched her and knocked her to the floor. Defendant continued to attack her, punching her in the back and side of her head and in the area of her kidneys. Blood from her head spattered the wall. She feared for her life. After repeatedly beating her, landing between 15 and 20 blows, defendant threatened that he would kill her if she called the police. Hein persuaded him to stop the beating by telling him that there was a parole warrant against her, so she had no desire to call the police.

On his way out of her room, defendant grabbed Hein's purse from the dresser and took the $115 she had placed inside. He warned her not to call the police and punched her again. Hein locked the door behind defendant and called the hotel manager, Rosher

Sebastian. She heard defendant yelling at the manager, who told defendant to "get out" because he was talking to the police. Hein saw defendant leave the motel and walk north on Sierra Highway toward the nearby Snooky's bar.

The prosecution presented two corroborating witnesses. Deputy Sheriff Steve Owen arrived within minutes of the incident. Hein was in pain, upset, scared, and bleeding from her chin and nose. She told him what happened, but declined medical attention because she was on probation and did not want to test positive for drugs. She gave defendant's description to two other officers, who went to look for him at the bar. Hein was promptly taken to Snooky's bar parking lot, where she identified defendant as her assailant. The officers found $115 in his pocket in the same denominations that Hein had previously told the deputy had been stolen. The money was returned to Hein.

Sebastian received a telephone call shortly after 9:00 p.m. He heard screaming on the line. He got up, looked out of his office window, and saw defendant walking toward him.[2] Sebastian told him to "go back to his room and sober up," but defendant walked out of the motel. Hein came out of her room. Her face and hands were scratched and bleeding. Hein accepted his offer to call the police, but she did not want medical help.

Defense

Daniel Handy, custodian of records for Bank of America, testified that a bank statement showed two automated teller machine withdrawals from defendant's account on May 16, 2007, one at Snooky's bar for $200 and the other from Sierra Liquor in Lancaster. The account had a balance of $4,262.90 after the withdrawals.

Defense investigator Alan Rush tried to locate Hein and Hector. The latter had been arrested on May 31, 2007, and was released on June 7, three days after the

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[2] Sebastian could not identify defendant at trial but knew that the person he saw was the male who had checked into room 6 with the same name as defendant.

preliminary hearing. Upon examination of defendant's clothes, he saw no rips or blood on them.

Defendant testified and admitted suffering "three prison priors." His most recent felony conviction was in 2003.[3] With regard to the underlying incident, defendant said that he went to see Hein to "get some dope" to share with "a girl [he] was with." Defendant gave Hein $20 for a taxi and $10 for a drug pipe. Defendant denied striking and robbing Hein. He had $115 in his possession on the day of the incident. He paid approximately $110 for the motel room, went next door to Snooky's bar, and withdrew $100 from the ATM there for "spending money." Defendant did not chase the prior motel manager with a knife; he and Hein merely had a "verbal argument" when she asked him to leave.[4]

Defendant "never even touched" Hein. At approximately 3:30 p.m. after defendant made the ATM withdrawal at Snooky's bar, defendant and Hein walked together to Sierra Liquor Store. Hein waited outside. Defendant saw his wife walk into the store with another man. Later that day, he received a telephone call from Hein, but hung up on her. Some hours later, he returned to the motel from a restaurant and walked to his own room and called Hein's room. She answered and invited him to her room, saying she had the $30 for him. Suspicious that he was being set up "to get jumped by some guys in the bathroom," he emptied the money from his wallet, but kept approximately $125 in his pants pocket. When he arrived, Hein gave him six $5 bills. He had given her a total of $80, but she only returned $30 and gave him no drugs—she kept the drugs, the pipe, and the balance of cash. When defendant was later arrested, the police would take the $159 he had on his person. In addition to the $30 he received back

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3 Defendant also admitted to numerous felony convictions, including a1987 conviction for grand theft of a gun, a 1988 conviction for possession of a controlled substance, and a 1990 conviction for various charges including first degree burglary and shooting at an inhabited dwelling.

4 During his direct testimony, the trial court revoked defendant's in propria persona status. Standby counsel conducted the balance of defendant's direct examination.

from her, he made two ATM withdrawals that afternoon—$100 from Snooky's bar and $200 from Sierra Liquor at 5:30 p.m. However, he paid the motel $140 for his room. He had been drinking beer on the day of the incident, but took no drugs, and was not inebriated.

Defendant met Hein six months before, when he would "hang out at the Sierra Liquor Store in the middle of the night waiting in her car." Defendant paid for her prostitution services "a few times."

DISCUSSION

Preliminary Hearing Claims

Defendant contends the preliminary hearing magistrate prevented him from adequately preparing for his preliminary hearing by failing to enforce his rights to discovery and by denying his request for a continuance and motion to set aside the information. Further, defendant asserts these supposed errors resulted in the violation of his state and federal constitutional rights to due process and a fair trial. As is well established, "[i]rregularities at the preliminary examination entitle an accused to reversal on appeal only if he 'can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination.'" (*People v. Aston* (1985) 39 Cal.3d 481, 494-495, citing *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 (*Pompa-Ortiz*).) Here, defendant fails to show any underlying error, much less prejudice following his trial.

At the time of the preliminary hearing, defendant had successfully invoked his right to proceed in propria persona under *Faretta v. California* (1975) 422 U.S. 806. Defendant sought a continuance on the ground that he needed more time to obtain evidence in support of an affirmative defense. The prosecution opposed the request on the ground that a delay would be prejudicial because the key witness, victim Hein, was suffering medical problems that limited her availability to testify. Moreover, the granting

of defendant's *Faretta* status had been conditioned on defendant's representation that he would be ready to proceed on that day. Defendant did not contradict the latter point, but questioned the veracity of Hein's medical condition. The trial court denied defendant's motion to continue the hearing, finding defendant failed to show good cause. As to defendant's asserted need to obtain evidence, the trial court told defendant that it would accept an offer of proof in lieu of actual evidence.

After the prosecution rested, defendant provided the trial court with an offer of proof as to his affirmative defense. Among other things, Sebastian, the motel manager, would testify that he refused defendant's offer to pay for a room with a credit card because defendant had no driver's license; however, Sebastian accepted a $150 cash "down payment." Defendant also hoped to have his investigator locate the previous manager to refute Hein's testimony that defendant had attacked him with a knife some years before. Defendant asserted that Hector, the woman Hein believed had been robbed by defendant before the incident, would testify that defendant had "never assaulted her." Additionally, documents from Bank of America would show that defendant made ATM withdrawals of $100 and $200 just before the alleged incident with Hein. That evidence, according to defendant, would prove that the money found in his possession when arrested was not stolen, but his own. Also, evidence that he had $4,000 in his bank account would tend to show a lack of motive to commit the robbery. In denying defendant's request for a continuance, the trial court assumed the truth of the offer of proof, but found it neither established an affirmative defense nor negated any element of the charged offenses.

Defendant reasserted those arguments and made others in connection with his unsuccessful motion to set aside the information under section 995 and on nonstatutory grounds. In asserting that a continuance was required to afford him adequate time to prepare a defense, defendant claimed he was denied the opportunity to obtain (1) documents from Bank of America showing amount of money in defendant's bank account and that he made ATM withdrawals shortly before the incident; (2) the

testimony of Sebastian, Hector, and Erwin Peralta (apparently, the prior motel manager); and (3) the testimony of Officer Owen to impeach Hein, based on his police report.

Leaving aside the fact that there was nothing unreasonable or arbitrary about the lower court's ruling (see *Wizar v. Superior Court* (1981) 124 Cal.App.3d 190, 195 ["Although petitioner had no statutory right to the requested continuance, constitutional considerations precluded the magistrate from arbitrarily denying it"]), defendant cannot show prejudice under *Pompa-Ortiz, supra,* 27 Cal.3d 519. Indeed, by accepting defendant's offer of proof, the magistrate obviated any need for delay in order to obtain the evidence. More fundamentally, defendant presented the Bank of America documents at trial and Sebastian and Deputy Owen testified at trial. Thus, to the extent there might have been any impropriety in the preliminary hearing, it was subsequently cured when the witnesses and evidence were made available to defendant at trial. (See *People v. Aston, supra,* 39 Cal.3d at p. 495.) As to potential witnesses Hector and Peralta, defendant fails to demonstrate that the prosecution had reason to believe they possessed exculpatory evidence.

Defendant's assertion that discovery violations by the prosecution fatally compromised his ability to present a defense at the preliminary hearing fares no better. In connection with his motion to set aside the information, defendant argued the prosecution failed to provide discovery as to Hein's prior convictions and the whereabouts of Hector. Once again, however, the information concerning Hein was provided to defendant before trial and he was able to use it for impeachment purposes. As to Hector's whereabouts, the fact remains that defendant can merely speculate that she would have been able to offer exculpatory testimony. Moreover, as the Attorney General points out, the likelihood of prejudice is further discounted because the evidence defendant identifies relates largely to the robbery count, which was ultimately dismissed. Defendant therefore fails to demonstrate that he was deprived of a fair trial or otherwise suffered prejudice as a result of the supposed errors at the preliminary hearing. (*People v. Aston, supra,* 39 Cal.3d at pp. 494-495; *Pompa-Ortiz, supra,* 27 Cal.3d at p. 529.)

Finally, defendant fails to identify any legal basis for claiming a violation of his constitutional rights to due process and a fair trial. For instance, defendant refers to the prosecution's obligation under *Brady v. Maryland* (1963) 373 U.S. 83, to turn over material favorable to the defense, but he makes no attempt to demonstrate the existence of *Brady* error. We therefore reject the constitutional aspect of this claim because it is asserted in perfunctory fashion without adequate supporting legal authority. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Valov v. Department of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1132.)

Trial Continuance

Defendant contends the same or similar discovery violations continued up to the time of trial, necessitating the grant of a pretrial continuance in order to protect defendant's constitutional rights to counsel, due process, and a fair trial. However, as in the trial court, defendant is extremely vague as to the nature of the purported discovery violations that he claims required a continuance. The only two potential witnesses identified as being subject to his discovery allegations are Hector and the prior motel manager. The only other evidence that defendant identifies as being belatedly provided appears to be a transcript of Sebastian's 9-1-1 telephone call at the time of the incident. As we explain, defendant fails to demonstrate any abuse of discretion in the trial court's ruling, much less anything indicative of a constitutional violation.

"Our Supreme Court has long pointed out that '"[i]t is a settled rule of practice that an application for a continuance is addressed to the sound discretion of the trial court."' [Citation.]" (*People v. Sandoval* (1977) 70 Cal.App.3d 73, 82.) The trial court's "determination as to whether a defendant has affirmatively demonstrated that justice requires granting the motion 'will not be disturbed on appeal in the absence of a clear abuse of that discretion.' [Citations]." (*Ibid.*) The preliminary hearing took place on June 4, 2007. Trial began 10 months later on April 8, 2008. On the first day of trial, defendant complained that he had been "sandbagged" because he did not have the

opportunity to interview the prosecution witnesses. To the extent defendant might be arguing that the prosecution somehow prevented access to Hein, however, the record shows that Hein declined to speak to the defense. Defendant offers no legal or factual basis for grounding his appellate claim on his pretrial access to the victim.

The trial court can hardly be blamed for failing to grant a continuance based on supposed discovery violations as to Hector and the prior motel manager as potential defense witnesses, because defendant did not mention them in requesting a continuance on the day of trial. Moreover, defendant makes no attempt to show they possessed *Brady* material—or that the prosecution had reason to believe they did. Nor does defendant demonstrate how the inability to present those witnesses prejudiced his defense. Neither below nor on appeal has defendant offered a reasonable basis to infer that testimony by Hector or the prior motel manager would have affected the jury's verdict. As is well established, "unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

From the record, it appears that defendant was not provided with the transcript or an accessible version of the recording of Sebastian's 9-1-1 telephone call before the trial began. The recording was played to the jury. The call was very short and tended to corroborate Sebastian's testimony. Once again, defendant fails to demonstrate any resulting prejudice. Indeed, he makes no attempt to show how the earlier provision of the transcript would have assisted his defense.

As with his prior contention, defendant fails to explain how the supposed abuse of discretion in denying him a continuance amounted to a constitutional violation. We therefore reject the constitutional aspect of this claim because it is asserted in perfunctory fashion without adequate supporting legal authority. (*People v. Stanley, supra,* 10 Cal.4th at p. 793; *Valov v. Department of Motor Vehicles, supra,* 132 Cal.App.4th at p. 1132.)

Continuance for Defendant's Trial Testimony

Defendant contends the trial court abused its discretion by refusing to delay the trial to give defendant more time to prepare to testify on his own behalf. Our review of the record reveals neither an abuse of discretion by the trial court nor prejudice to defendant.

The prosecution rested its case just before the lunchtime recess on April 10, 2008, a Thursday, after defendant had completed his recross-examination of Deputy Owen. Defendant requested the trial be continued until the following Monday because he was "feeling really very fatigued." Defendant told the trial court that prior blood test results had raised concerns that he might have serious medical problems, but defendant did not state that he had been diagnosed with any such condition. Defendant added that the trial itself had caused him psychological stress that made him "very mentally, emotionally fatigued," such that he did not believe he was capable of testifying on his own behalf that afternoon. The trial court disagreed, noting that defendant appeared to be "just fine." Defendant protested, adding that his throat was "too dry," he was "feeling really stressed out" and having "really bad headaches." When the trial court stated that defendant "seemed very fine all day today and all day yesterday" and had not voiced any such complaints before, defendant added that he lacked time to prepare because of the time he had spent on a pretrial motion.[5] Based on its observations of defendant throughout the trial, the trial court found defendant was "perfectly capable of getting on the stand and telling [his] story" and was "in fine shape to be able to testify this afternoon."

Following the afternoon break, the prosecutor and defendant engaged in an extended colloquy with the trial court concerning the scope of defendant's first proposed witness, private investigator Rush. The record contains no indication that defendant was

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[5] In response to defendant's representation that the motion was necessitated by information his investigator received from the prosecution that witness Hein had "disappeared," his investigator informed the trial court (outside the jury's presence) that he had *not* received any such representation.

overly fatigued or otherwise disabled from representing himself. Rush testified concerning his investigative efforts, including those concerned with locating Hector. The examination did not take very long and, again, there was no indication that defendant was suffering from any significant physical or mental impairment. The trial court dismissed the jury for the day, without requiring defendant to testify that day. When trial resumed the next day, defendant did not mention any recurrence of the fatigue-related problems he had referred to before. He recalled Rush to the stand. After that examination was completed, the trial court took a short recess to inquire whether defendant would testify. Defendant responded affirmatively and made no complaint as to any physical or emotional distress.

As our summary of the proceedings shows, the trial court was well within its discretion in denying defendant's request for an extended continuance. The trial court was entitled to take into account its own observations of defendant's demeanor and abilities in evaluating the credibility of defendant's representations of medical disability. (See, e.g., *People v. Avila* (2004) 117 Cal.App.4th 771, 779 [in assessing a defendant's competency, "the record fully supports the trial court's determination that although defendant was experiencing pain, he was '[coherent], quite lucid, and able to communicate with his attorney.' Defendant's demeanor and conduct during trial and the surrounding circumstances all support the trial court's conclusion regarding defendant's mental condition."].) This is especially so here, given that defendant presented the trial court with no medical corroboration for his complaints.

Based upon our review of the record, we hold the trial court acted reasonably. Despite finding an absence of medical necessity for delay, the trial court did not force defendant to testify immediately, but recessed early that afternoon to give defendant additional time to rest and prepare. In so doing, the trial court went out of its way to conduct the trial "in a manner that reasonably accommodate[d] the special needs of the accused to the extent that this [was] practicable in light of courtroom security considerations and other legitimate constraints. [Citations.] The trial court fully satisfied this limited obligation. It behaved at all times in a considerate fashion." (*People v. Avila,*

supra, 117 Cal.App.4th at p. 781.) Finally, nothing in the record indicates that an additional day's continuance would have benefitted defendant. Any finding to the contrary would be a matter of pure speculation.

Continuance for Sentencing

Defendant contends the trial court abused its discretion by denying his request for a continuance of the sentencing hearing. We disagree.

The jury rendered its verdict on April 15, 2008. Defendant informed the trial court that he planned to submit a motion for new trial in conjunction with the sentencing hearing. The parties and the trial court agreed to have the hearing on June 10. Defendant understood that his motion would have to be filed by that date. In response to defendant's request, the trial court represented that it would order the trial transcripts for defendant. For purposes of sentencing, the trial court also informed defendant that a statement of mitigating factors should be filed before the hearing. On June 10, defendant requested that sentencing be continued because he had not received the trial transcripts, which he needed for "prosecutorial misconduct issues." Defendant had filed his new trial motion, but did not have "a chance to do anything in mitigation," and mentioned his efforts to locate Diana Tanner as a trial witness.[6] He also asserted his desire to request a new probation report. The trial court denied the motions for continuance and for a new trial.[7]

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[6] Tanner appears to be defendant's ex-wife.

[7] "Courts have held that a trial court may properly deny a request for free transcripts for use in a motion for new trial or for use in other requests for collateral relief unless the indigent defendant first demonstrates that the transcript is necessary for effective representation by counsel." (*People v. Markley* (2006) 138 Cal.App.4th 230, 241, fn. omitted.)

At the hearing, Hein made a statement pointing out defendant's lack of remorse and asserting her belief that he would commit future acts of violence. Defendant represented that he did not cause Hein any injury and pointed to what he believed was a lack of corroboration as to any serious injury to Hein. He also represented that Hein's testimony was the product of personal bias, and Tanner would testify that defendant never chased the prior motel manager with a knife. As a factor in mitigation, defendant reiterated his belief that there was no credible evidence he caused any physical injury to Hein. The trial court sentenced defendant to a total sentence of 29 years to life under the three strikes law.

"'The determination of whether a continuance should be granted rests within the sound discretion of the trial court, although that discretion may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.' [Citation.]" (*People v. Jackson* (2009) 45 Cal.4th 662, 677-678; *People v. Samayoa* (1997) 15 Cal.4th 795, 840 ["In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of his or her motion for a continuance does not require reversal of a conviction"].) As our summary of the proceedings shows, defendant has not demonstrated an abuse of discretion or prejudice.

Defendant claims the trial court acted unreasonably by refusing to continue sentencing to allow defendant the benefit of the trial transcripts. At no point, however, does he explain how those transcripts were necessary—or even relevant—to his preparations for sentencing. As the Attorney General points out, defendant was subject to a mandatory three strikes law sentence. Neither below nor on appeal does defendant explain how a continuance would have assisted him in making an effective challenge to the mandatory sentence he received. For instance, defendant does not assert that the continuance was needed to provide the basis for potentially a meritorious motion under section 1385 to strike a prior felony conviction in furtherance of justice. (See *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529-530.) Under *Romero*, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background,

character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Defendant's reliance on *People v. Trapps* (1984) 158 Cal.App.3d 265 is misplaced. There, the trial court denied the defendant's request to continue his sentencing hearing to obtain new counsel, causing the defendant to be sentenced while represented by counsel with whom he claimed to have a conflict. The *Trapps* court concluded that the trial court abused its discretion in denying the continuance, emphasizing that the trial court's action deprived the defendant of counsel of his choice for no good reason. (*Id.* at p. 271.) Nothing similar occurred here. Indeed, it was defendant who failed to justify his need for a continuance, while the prosecution and the victim would have been significantly inconvenienced by a postponement.[8]

Advisory Counsel

Defendant contends the trial court abused its discretion in failing to appoint advisory counsel. The claim fails because defendant never sought appointment of advisory counsel, and the trial court had no reason to exercise its discretion concerning such appointment.

In a pretrial proceeding, the trial court granted defendant's request to proceed in propria persona under *Faretta v. California*, *supra*, 422 U.S. 806. Standby counsel was also appointed. California courts have discretion to appoint "standby" or "advisory" counsel in cases in which an indigent defendant chooses self-representation. (See *People*

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8 Defendant's perfunctory citation to the state and federal Constitutions' provisions concerning the right to counsel and due process, without any analysis, is insufficient to raise those constitutional claims on appeal. (*People v. Stanley*, *supra*, 10 Cal.4th at p. 793; *Valov v. Department of Motor Vehicles*, *supra*, 132 Cal.App.4th at p. 1132.)

v. Bigelow (1984) 37 Cal.3d 731, 742-744 (*Bigelow*).) "'Standby counsel' is an attorney appointed for the benefit of the court whose responsibility is to step in and represent the defendant if that should become necessary because, for example, the defendant's in propria persona status is revoked. [Citations.] 'Advisory counsel' by contrast, is appointed to assist the self-represented defendant if and when the defendant requests help." (*People v. Blair* (2005) 36 Cal.4th 686, 725.)

As defendant recognizes, "a defendant who elects to represent himself or herself has no constitutional right to advisory or stand-by counsel or any other form of 'hybrid' representation. (*McKaskle* [*v. Williams* (1984) 465 U.S. 168,] 183; *People v. Bloom* (1989) 48 Cal.3d 1194, 1218.) Indeed, the Supreme Court in *McKaskle* . . . specifically stated '*Faretta* does not require a trial judge to permit "hybrid" representation[.]'" (*People v. Garcia* (2000) 78 Cal.App.4th 1422, 1430 (*Garcia*).) As the Attorney General points out, defendant never requested the appointment of advisory counsel. Accordingly, there was no attempt to make the required showing of need and no occasion for the trial court to exercise its discretion.

Contrary to defendant's assertion, nothing in the record supports the inference that defendant made such a request or that the trial court believed it lacked the discretion to appoint advisory counsel. At a pretrial hearing on December 17, 2007, while the matter was pending before the Honorable Hayden Zacky, the trial court asked defendant whether defendant wanted to retain his in propia persona status. When defendant complained that he had not yet had the opportunity to speak to standby counsel, the trial court accurately and unambiguously explained that standby counsel's role was limited to taking over defendant's representation—and did not include discussing strategy with defendant. Defendant informed the trial court that he was "going to hold off on giving up [his] pro per status at this particular time." Nothing in defendant's statements indicated that he desired the trial court to consider the appointment of advisory counsel.

Accordingly, defendant's reliance on *Bigelow, supra,* 37 Cal.3d 731 is unavailing. There, the trial court denied the defendant's request for advisory counsel based on its erroneous belief "that California law d[id] not permit the appointment of advisory

counsel." (*Id.* at p. 742.) "Mistakenly believing it had no authority to appoint advisory counsel, the trial court failed to exercise its discretion." (*Id.* at p. 743.) That did not occur in defendant's case. We decline defendant's invitation to infer that the trial court labored under a mistaken belief as to its authority to make an appointment if requested. Such an inference would be based purely on speculation. Nor does California law impose on the trial court a sua sponte obligation to inform defendant of the potential availability of advisory counsel.

Lesser Included Offense Instruction

Defendant was convicted of committing an assault upon Hein by means of force likely to produce great bodily injury under section 245, subdivision (a)(1). The jury was instructed as to the elements of that offense, but not as to the lesser included offense of simple misdemeanor assault under section 240.[9] Defendant contends the trial court prejudicially erred in failing to instruct the jury on the lesser offense. We reject the claim because there was no substantial evidence to support a conviction for simple assault, rather than the aggravated offense: Acceptance of the prosecution case supported the verdict of assault by means likely to produce great bodily injury, while acceptance of defendant's testimony supported acquittal, not a finding of simple assault.

"'In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* [(1998)] 19 Cal.4th [142,] 154.) This obligation includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. (*Ibid.*) The trial court must so instruct even when, as a matter of trial tactics, a defendant not only fails to request the instruction, but expressly objects to its

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[9] "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.)

being given. . . .' [Citation.]" (*People v. Moye* (2009) 47 Cal.4th 537, 548.) Simple assault is a lesser included offense of assault by means of force likely to produce great bodily injury. (*People v. Berry* (1976) 18 Cal.3d 509, 518-519.) However, "'[t]he trial court may properly refuse to instruct upon simple assault where the evidence is such as to make it clear that if the defendant is guilty at all, he is guilty of the higher offense [felonious assault].' [Citations.]" (*Id.* at p. 519.) Such was the case here.

"Section 245 'prohibits an assault by means of force *likely* to produce great bodily injury, not the use of force which does in fact produce such injury. While . . . the results of an assault are often highly probative of the amount of force used, they cannot be conclusive.' (*People v. Muir* (1966) 244 Cal.App.2d 598, 604, some italics omitted.) Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate. (See *People v. Covino* (1980) 100 Cal.App.3d 660, 668; CALJIC No. 9.02.) '"The crime . . . , like other assaults, may be committed without the infliction of any physical injury, and even though no blow is actually struck. [Citation.] The issue, therefore, is not whether serious injury was caused, but whether the force used was such as would be likely to cause it."' (*People v. Duke* (1985) 174 Cal.App.3d 296, 302, italics omitted.) The focus is on the force actually exerted by the defendant, not the amount of force that could have been used. (*Id.* at p. 303.) The force likely to produce bodily injury can be found where the attack is made by use of hands or fists. (*People v. Kinman* (1955) 134 Cal.App.2d 419, 422.) Whether a fist used in striking a person would be likely to cause great bodily injury is to be determined by the force of the impact, the manner in which it was used and the circumstances under which the force was applied. [Citation.]" (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 748-749.)

Hein testified that defendant punched her and knocked her to the floor, punched her in the back and side of her head and in the area of her kidneys, landing between 15 to 20 blows, placing her in fear of her life, and causing blood from her head to spatter the wall. Although she did not seek medical treatment, she offered a plausible rationale for refraining. Moreover, Deputy Owen testified that when he arrived shortly after the attack, she was very upset, scared, and bleeding from the nose and chin. In stark contrast,

defendant denied striking Hein, testifying that he "never even touched her." The prosecution case, if accepted, supported only a conviction under section 245, not under section 240. If, on the other hand, a reasonable juror accepted defendant's case, he or she would have no evidentiary basis for finding simple assault, but would have to acquit. (See *People v. Berry, supra,* 18 Cal.3d at p. 519.; *People v. McDaniel, supra,* 159 Cal.App.4th at p. 749.) Therefore, there was no sua sponte obligation to instruct on simple assault.

In any event, any such instructional error would have been nonprejudicial under the *Watson* test (*People v. Watson* (1956) 46 Cal.2d 818, 836), "made applicable to instructional errors of this sort in California trials by [*People v.*] *Breverman, supra,* 19 Cal.4th at pages 177-178." (*People v. Moye, supra,* 47 Cal.4th at p. 555.) Under that standard, the failure to instruct on a lesser included offense will be deemed harmless if "it is not reasonably probable defendant would have obtained a more favorable outcome had the jury been so instructed." (*Id.* a p. 556.) Review under *Watson* "'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result. . . .' [Citation.]" (*Ibid.*)

As our summary of the evidence demonstrates, there is no reasonable probability that the jury would have found defendant guilty of simple assault if that option had been provided. A reasonable juror who found defendant assaulted Hein would necessarily have accepted her testimony, as corroborated by Deputy Owen, that defendant punched her repeatedly in the head with sufficient force to break her skin—which is aggravated, not simple, assault.

Limitation on Closing Argument

"It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.) Defendant contends that the trial court abused its discretion by imposing a 10- to 15-minute limit on defendant's closing argument and, in so doing, violated his constitutional right to due process. The claim fails because defendant failed to interpose a timely objection, the trial court's limitation was reasonable under the circumstances, and nothing indicates the limitation prejudiced the defense.

Our review of the record shows that during the course of defendant's long, rambling, and disjointed direct testimony—most of which was argumentative and had little to do with a defense to the charges—defendant became increasingly obstreperous and rude in response to legitimate prosecution objections and the trial court's attempts to insist that defendant confine himself to relevant matters. After approximately one hour of testimony, the trial court found defendant in contempt and ordered the bailiff to handcuff and escort defendant out of the courtroom. Out of defendant's presence during the lunchtime recess, the trial court found that defendant had "acted out" numerous times in contempt of court and inquired whether stand-by counsel was prepared to take over in the event the trial court revoked defendant's in propria persona status. In discussing various options for proceeding with the trial, standby-counsel reminded the trial court of its right to limit the time of examination and closing argument.

With no objection, the trial court relieved defendant of his in propria persona status and ordered standby-counsel to take over the defense, making findings as to defendant's contemptuous behavior and refusal to abide by court procedures. Before trial resumed, defendant apologized to the trial court for his "earlier disrespect." Standby-counsel began his direct examination by allowing defendant to apologize to the jury for his "outburst." At the close of evidence, the trial court engaged in a colloquy with defendant outside the jury's presence. The trial court allowed defendant to present his

own closing argument, subject to a 10- to 15-minute time limit—"and if he needs a little more time, he can always ask the court." There was no objection to the time limitation by standby-counsel or defendant. Indeed, it appears the parties understood that the resumption of defendant's in propria persona status was conditioned on his acceptance of time limitations.

Our Supreme Court has long recognized the trial court's "enlarged discretion" to impose reasonable limitations on argument "so that the time be not wasted in arguments, disputes, and contentions, having no tendency to bring about a fair and legal disposition of judicial business." (*People v. Keenan* (1859) 13 Cal. 581, 584.) Nevertheless, that discretion must be exercised so as not to violate the "constitutional privilege of the accused to be fully heard by his counsel" or to deny him an opportunity to present a "full and complete defense." (*Ibid.*) Reversible error has been found only where a timely objection was interposed at trial and the defendant showed prejudice on appeal. (See *People v. Stout* (1967) 66 Cal.2d 184, 200.)

Here, not only was there no contemporaneous objection to the time limitation, but the record indicates the defense agreed that the limitation was appropriate. Although the trial court made it clear that it would entertain a request for additional time, defendant made none—which supports the strong inference defendant felt none was needed. It was not until the morning of the second day of jury deliberations that defendant complained about the time limitation. Defendant asserted the time restriction was a due process violation and requested that argument be reopened or the matter be dismissed. He did not explain how additional argument would be helpful, but merely argued that "serious" cases like his "require an hour or more." The trial court denied the motion, finding that defendant effectively spent more than an hour in closing argument because his direct testimony amounted largely to argument.[10]

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10 The prosecutor's opening argument was contained in 17 pages of reporter's transcript; defendant's argument was 13 pages; and rebuttal argument was less than a page.

Defendant's case is easily distinguished from those in which the California Supreme Court found argument limitations supported a due process violation. In none of those cases had the trial court found defense counsel to have previously engaged in misconduct. Here, however, not only had defendant been found in contempt for abusing his in propria person status, but he had repeatedly demonstrated a failure to limit his examination and argument to relevant matters. The trial court's limitation can hardly be deemed arbitrary in light of defendant's prior misconduct.

Finally, there has been no showing of prejudice. Defendant has never attempted to explain what he would have argued or how additional argument would have made a significant difference to his defense. For instance, this was nothing like *People v. Keenan, supra,* 13 Cal. 581, in which the trial court "limited the time for the argument against the prisoner's consent" and despite his timely objection, refused to grant a timely request for additional time to argue, and failed to credit "affidavits of counsel of respectability and standing show that they were prevented by this restriction from a full and fair defense of their client"—all in a first degree murder prosecution involving voluminous testimony from at least 14 different witnesses, many of whom were examined at great length. (*Id.* at p. 584.)

As our discussion shows, nothing similar occurred to defendant. His trial was straightforward and involved few witnesses and no complex testimony or evidentiary matters. Moreover, his argument dealt comprehensively with the strongest aspect of his defense—the evidence of ATM withdrawals and its bearing on the robbery count. Defendant thoroughly discussed the evidence concerning the assault count, including the lack of any medical corroboration of Hein's injuries. With regard to prejudice, it must not be forgotten that defendant prevailed on two of the three counts. As to the assault conviction, however, the evidence was much stronger, especially as the prosecution corroborated Hein's testimony with testimony by Deputy Owen and Sebastian. Again, nothing suggests the time limitation prevented defendant from presenting an effective defense to the assault charge.

Motion to Reopen the Defense Case

"The decision to grant or deny a motion to reopen . . . remains in the discretion of the trial court." (*People v. Monterroso* (2004) 34 Cal.4th 743, 779.) Defendant argues the trial court abused its discretion by denying his motion to reopen, which was filed on the first full day of jury deliberations. At that time, defendant asserted that he and his investigator had made repeated, unsuccessful efforts to locate a material witness, Tanner, who apparently had been defendant's wife, but currently had a "new relationship" and did not want to testify for defendant. According to defendant, Tanner was in custody and scheduled to appear in an unrelated matter the following day. Defendant believed Tanner would be able to contradict Hein's testimony that defendant had "pulled a knife" on the prior motel manager after a prostitution incident two years before the underlying incident.

The record discloses no abuse of discretion. Defendant's showing of diligence in seeking to obtain Tanner's presence is dubious, given that he was in contact with her, but failed to subpoena her for trial. Further, in light of defendant's admission concerning her disinclination to testify, his assertion that she would provide favorable testimony appears questionable at best. However, even assuming she could have been found and produced for trial—and would have been willing to testify as defendant stated—the trial court had no obligation to permit the belated testimony. As the trial court found in denying the motion, Tanner's testimony would be "impeachment on a collateral matter." The purpose of Hein's testimony was merely to explain her intention to call the police—because she was afraid of defendant. Courts have broad discretion to exclude such impeachment evidence. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 296-297; *People v. Redmond* (1981) 29 Cal.3d 904, 913; *People v. Flores* (1977) 71 Cal.App.3d 559, 567.)

Nor is there any reasonable likelihood that the ruling prejudiced defendant under the *Watson* test. Even assuming the jury would find testimony from Tanner credible, it would not have undercut the key aspects of the prosecution case for assault—including the corroboration by Deputy Owen and Sebastian. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Restraints

Defendant contends the trial court prejudiced him by erroneously ordering the imposition of physical restraints on defendant during trial. His claim fails because defendant did not timely object to the imposition of restraints and failed to develop an adequate record to permit appellate review.

A trial court's decision to order restraints on a defendant will be upheld in the absence of an abuse of discretion. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 986.) However, there must be a showing of "'violence or a threat of violence or other nonconforming conduct.'" (*Id.* at p. 987, quoting *People v. Duran* (1976) 16 Cal.3d 282, 291.) The trial court must "base its determination on facts, not rumor and innuendo even if supplied by the defendant's own attorney." (*People v. Cox* (1991) 53 Cal.3d 618, 652, superseded in part by statute in *Jones v. Superior Court* (1994) 26 Cal.App.4th 1202, 1210.)

Nevertheless, "[i]t is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal. Defendant's failure to object and make a record below waives the claim here. [Citations.]" (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583; cf., *Estelle v. Williams* (1976) 425 U.S. 501, 512-513, fn. omitted ["the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation"].) Further, the Supreme Court has "consistently held that courtroom shackling, even if error, was harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense. [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 596.)

Defendant, representing himself, filed a pretrial motion to be free of any kind of restraints in all court appearances. The trial court denied the motion, but specified that he would allow defendant's hand to be free so that he could take notes during that hearing. The trial court's ruling was limited to the pretrial hearing; it reserved ruling on the necessity of restraints in the future. In ruling the imposition of leg restraints warranted at

the time, the trial court adverted to the violent nature of the underlying charges, defendant's history of violent offenses, and that defendant had been admonished by other judges at least twice for disrupting proceedings. Defendant had been previously admonished for interrupting the court during the preliminary hearing, and the trial court would so admonish defendant during that very hearing for interrupting and for disregarding the bailiff's instructions.

A minute order on the first day of trial reflects a court order that a "ste[a]lth belt be used throughout the trial for the defendant as he has a history of violence." As defendant acknowledges on appeal, the record contains no indication of any objection by defendant. Although the record does not explain what a "stealth belt" is, according to defendant, it is a device that attached defendant to his chair and forced him to remain seated. There is no reason to think the device was visible, and defendant does not explain how its imposition prejudiced him. Defendant does not contend that he was otherwise shackled or restrained. Nothing in the record suggests the jury saw any restraints. It was defendant's obligation to make a record sufficient to allow meaningful appellate review. Accordingly, defendant has forfeited his claim as to the imposition of restraints during trial. (*People v. Tuilaepa, supra,* 4 Cal.4th at p. 583; *Estelle v. Williams, supra,* 25 U.S. at pp. 512-513), and error, if any, was harmless. (*People v. Anderson, supra,* 25 Cal.4th at p. 596.)

Lack of Admonishment to Disregard Defendant's Behavior

Defendant contends the trial court erroneously and prejudicially failed to sua sponte instruct the jury to disregard the misconduct by defendant that resulted in his being forcibly removed from the courtroom. We disagree.

The trial court instructed the jurors to make their decision "based only on the evidence that has been presented" and not to be influenced by "bias, sympathy, prejudice, or public opinion." Evidence was defined as sworn testimony of witnesses, exhibits admitted into evidence, along with anything the trial court instructed the jury to consider

as evidence. In addition, the trial court instructed the jury "not to take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be." As such, the instructions given did not provide the jury with license to consider defendant's misbehavior as evidence of guilt. Moreover, defendant failed to request a special admonition not to consider his "outburst." Such "pinpoint instructions 'are not required to be given sua sponte.' [Citation.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 361.)

Defendant's reliance on *People v. Arias* (1996) 13 Cal.4th 92 is misplaced. The *Arias* court did not hold an admonition to disregard a defendant's misbehavior is necessarily required following a disruptive outburst. To the contrary, no error was found where the trial court failed to provide a contemporaneous admonition. "Because the court saw exactly what the jurors saw, it was in a position to assess the probable effect on their ability to perform their duties." (*Id.* at p. 148.) The court's admonitions on other occasions along with its instruction to decide the case solely on the facts presented were held sufficient under the circumstances. (*Ibid.*)

Finally, assuming the instruction should have been given, its omission was harmless. The failure to give a pinpoint instruction is judged under the *Watson* harmless error test. (*People v. Wharton* (1991) 53 Cal.3d 522, 571.) A finding of prejudice could only be based on speculation.

Cumulative Error

Defendant argues the cumulative effect of the errors. "We have found no errors that can be deemed cumulatively prejudicial." (*People v. Box* (2000) 23 Cal.4th 1153, 1219.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.